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No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

FirsTier Mortgage Co., a/k/a Realbanc, Inc. ("FirsTier"), Petitioner, sued Investors Mortgage Insurance Co. ("IMI"), Respondent, for enforcement of eight policies of private mortgage-guaranty insurance. IMI moved for summary judgment. The trial court heard IMI's Motion for Summary Judgment on January 26, 1989. At the conclusion of the hearing, the trial court announced his order, from the bench, that the

policies "***are cancelled.***" (J.A. p. 27.)[1] The clerk made a docket entry of the proceedings.

For reasons unknown to FirsTier, IMI chose to paraphrase the clerk's January 26, 1989 docket entry. (IMI's Brief, f.n. 5, pp. 9 & 10.) Perhaps IMI did this because the actual docket entry requires some decoding. The docket entry reads:

> HRG ON DFT'S MTN SJ: cnsl apr & Ct hrs oral args fm both sides; Ct advises policy ***should be &/or*** *[sic]* ***cancelled as void*** for want of fraud, bad faith; no evidence in hrg to hold [sic] policy void; dft's cnsl to subm sugg FF&CofL as to ea loan w/i 10 days & send cpy to plf's cnls & plf's cnls to obj or sugg FF&CofL 5 days t/a; Ct will then modify, add to or delete & enter own FF&CofL (BOHANON) ap (App. to Pet. for Cert. p. F-13, Entry No. 148; emphasis added.)[2]

Compare the clerk's minute on the docket sheet with the language of the transcript:

> I find that the policies should be and ***are cancelled as void*** for want of [sic] fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that ***the policies are void.*** (J.A. p. 27; emphasis added.)

On March 3, 1989, the trial court memorialized its January 26, 1989 order in a written Order and Judgment. (App. to Pet. for Cert. p. D-1.)

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[1] References to the Joint Appendix will begin with "J.A." followed by the page number in the Joint Appendix.

[2] References to items printed in the Appendix to the Petition for a Writ of Certiorari will begin with "App. to Pet. for Cert." followed by the page number in the Appendix where the documents can be found.

On February 8, 1989, FirsTier filed its Notice of Appeal from the January 26, 1989 oral announcement. (J.A. p. 54.) The Notice of Appeal says that FirsTier appeals "from the Judge's ruling announced by the Court in this action on the 26th day of January, 1989, but not yet entered on its judgment docket. F.R.A.P. 4(a)(2)." The February 8, 1989 Notice of Appeal resulted in Appeal No. 89-6042. The United States Court of Appeals for the Tenth Circuit dismissed this appeal for lack of jurisdiction because "[t]he oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.)

There are three related appeals pending before the Tenth Circuit Court of Appeals.[3] Appeal Nos. 89-6145 and 89-6150 were both set for oral argument before the Tenth Circuit Court of Appeals on May 1, 1990. However, the Tenth Circuit Court of Appeals did not hear oral argument in both cases. When counsel for IMI appeared at the May 1, 1990 hearing, counsel for IMI announced that IMI elected to have Appeal No. 89-6150 submitted and decided on the briefs alone. The court of appeals has not heard oral argument in Case. No. 89-6150.

SUMMARY OF ARGUMENT

The trial court's oral order was the court's "announcement of a decision or order" within

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[3] For a description of the issues in Appeal Nos. 89-6145 and 89-6150, see FirsTier's Brief filed before this Court on April 12, 1990, f.n. 7, pp. 6 & 7. The third appeal is FirsTier's appeal from the trial court's award of IMI's attorney's fees, Appeal No. 89-6128.

the meaning of F.R.A.P. 4(a)(2). The oral order was final in the sense that it was a decision on the merits of all of the issues as to all of the parties. At the trial court level, the court and the parties understood the oral order to be final in this sense.

The fact that the trial court also announced his intention to memorialize his decision in a written judgment does not destroy finality of the oral announcement for purposes of F.R.A.P. 4(a)(2). To hold otherwise would disregard the distinction, recognized in the rule, between "announcement of a decision or order" and "entry of the judgment or order." Such a construction of the rule would also render the rule useless and ineffective because the rule could never give prospective effect to a notice of appeal from an oral decision which is followed by a written judgment.

The restrictive interpretation given to F.R.A.P. 4(a)(2) by the Tenth Circuit Court of Appeals would rewrite the phrase "announcement of a decision or order" to read "announcement of a final judgment." That interpretation violates the clear language and purpose of the rule. The stated purpose of the rule, as announced by the Advisory Committee, is the validation of an appeal noticed after announcement of a non-final decision which is subsequently entered as a part of the district court's final judgment.

ARGUMENT

PROPOSITION 1

TRIAL COURT ANNOUNCED FINAL DECISION AND ORDER ON JANUARY 26, 1989

A. Trial Court Decided All Issues as to All Parties on January 26, 1989. FirsTier sued IMI to enforce eight policies of private mortgage insurance. At the conclusion of the January 26, 1989 hearing on IMI's Motion for Summary Judgment, the trial court said "that the policies should be ***and are cancelled as void*** . . . ." (J.A. p. 27.) The trial court also said ". . . the policies ***are void***." *(Id.)* Contrary to IMI's assertion (IMI's Brief, p. 11), the trial court's oral order was not a statement of intention. The trial court spoke in the present tense. The trial court said that all of the policies "***are cancelled***" and "the policies ***are void***." (J.A. p. 27.) The trial court's oral decision disposed of all issues as to all parties and was final.

The opinion of the Tenth Circuit Court of Appeals does not say why the trial court's oral announcement was not a final decision. IMI contends that the trial court's oral announcement of its decision and order was not a final decision because the announcement was not intended as the court's final act. IMI makes this contention apparently because the trial judge announced his intention to memorialize his decision in a memorandum opinion and judgment. (IMI's Brief p. 13.) IMI's reasoning would emasculate F.R.A.P. 4(a)(2). Utilizing IMI's reasoning, F.R.A.P. 4(a)(2) could never give prospective effect to an appeal filed after announcement of an oral decision or order when the trial court later

memorializes its decision in a written journal entry. Utilizing IMI's reasoning, courts would be required to ignore F.R.A.P. 4(a)(2) in its entirety. Even before F.R.A.P. 4(a)(2) was adopted, the courts did not follow IMI's strict construction of what is meant by a "final decision or order." See, e.g., *Matter of Grand Jury Empaneled January 21, 1975,* 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge,* 507 F.2d 87 (3d Cir. 1975); *Song Jook Suh v. Rosenberg,* 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy,* 365 F.2d 385 (9th Cir. 1966) *cert. den.,* 386 U.S. 1011 (1967); *Firchau v. Diamond Nat'l Corp.,* 345 F.2d 269 (9th Cir. 1965).

B. Parties Treated Oral Decision as Final. IMI has argued that the trial court's oral decision and order was treated as interlocutory by the parties. (IMI's Brief p. 10.) IMI suggests that, when IMI filed its February 10, 1989 Application for Award of Attorney's Fees, it did not regard the oral announcement as a final decision because "nothing in the local court rules prevents a party from filing a fee application *before* announcement of a final decision." (IMI's Brief f.n. 6, p. 10; emphasis in original.) IMI's argument ignores the obvious: in order to be entitled to seek attorney's fees pursuant to Local Rule 6, the movant must be the prevailing party. In its February 10, 1989 fee application, IMI repeatedly characterized itself as the prevailing party.[4] (J.A. pp. 30-33.) Finally, IMI cannot dispute that in its

[4] Local Rule 6(E) also requires the movant to recite the statutory authority for its fee request. Consistent with the rule, in its February 10, 1989 fee application, IMI cited 36 O.S. §3629(B) as the statutory basis for its fee request. (J.A. p. 31.) IMI said that the statute "provides that the *prevailing party* in an action to recover on an insurance policy is entitled to recover its attorney's fees." *(Id.)*

February 10, 1989 Application for Attorney's Fees, IMI said: "IMI is clearly the prevailing party in the instant case ***since judgment was entered in favor of IMI as a matter of law*** and Firstier took nothing by way of its complaint." (J.A. p. 31; emphasis added.) It is proper to consider the trial court's and the parties' understandings and intentions to maintain an appeal. *United States v. F.&M. Schaefer Brewing Co.,* 356 U.S. 227 (1958).

Now IMI also wants to say that judgment was not announced until March 3, 1989. (IMI's Brief pp. 5, 8, 12, 14, 15 and 21.) But IMI's new characterization of its understanding of the trial court's decision is inconsistent with the record in the case. (See FirsTier's Brief pp. 11-15.)[5] When IMI filed its Bill of Costs, it took particular pains to revise the printed form to reflect that judgment was "***announced***" rather than "entered" on January 26, 1989. (FirsTier's Brief p. 12.) IMI offers no explanation of why it now takes a contrary position.

C. IMI Omits Results of Case Law Discussed in its Brief. IMI cites several cases which discuss situations in which a trial court intended to follow an oral announcement with a written judgment. See, e.g., *United States v. F.&M. Schaefer Brewing Co.,* 356 U.S. 227 (1958); *Campbell Industries v. Offshore Logistics Int'l., Inc.,* 816 F.2d 1401 (9th Cir. 1987); *Carnes v. United States,* 279 F.2d 378 (10th Cir. 1960). (IMI's Brief Proposition I.) IMI's discussion of the principles

[5] Reference to the Brief of Petitioner filed with this Court on April 12, 1990 will be to "FirsTier's Brief" followed by the page numbers in the Brief to which reference is made.

announced in these cases is accurate as far as the discussion goes. The problem is that the discussion stops short of the results in the cases. And, in each of these cases, the issue was whether the appeal was filed ***too late.*** In each of the cases, the appellate courts found that the appeal was timely because it was filed within the specified period of time after entry of a judgment. The appellate courts construed the rules to ***save*** the appeal, not to defeat it. If the case law authorities cited in Proposition I of IMI's Brief apply to this case at all, they support FirsTier's position.

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED ON MARCH 3, 1989, IMMEDIATELY AFTER THE TRIAL COURT MEMORIALIZED ITS DECISION IN A WRITTEN ORDER

A. Trial Court's Oral Order Identical to Written Order. At the conclusion of the January 26, 1989 hearing, the trial judge announced his decision. He ordered the subject insurance policies which were the subject matter of FirsTier's lawsuit "should be and ***are cancelled.***" (J.A. p. 27.) He said ". . . the policies ***are void.***" (Id.) Then, on March 3, 1989, the trial court entered a judgment which also found that the policies "***are void*** and, as such, ***are unenforceable.***" (App. to Pet. for Cert. p. D-1.). At the conclusion of its Memorandum Opinion, also entered on March 3, 1989, the trial court memorialized his decision that "the eight insurance policies at issue in this case ***are declared void.***" (App. to Pet. For Cert. p. E-15.) Contrary to IMI's assertion (IMI's Brief p. 16), the

trial court's oral decision and order and its subsequent memorialization of its order in a judgment were identical. The court of appeals should have treated FirsTier's February 8, 1989 Notice of Appeal as if it were filed on March 3, 1989, immediately after the trial court entered its Memorandum Opinion and Order and Judgment. F.R.A.P. 4(a)(2).

B. F.R.A.P. 4(a)(2) Intended To Treat Notice of Appeal From Non-appealable Order as Directed to Subsequently Entered Final Order. Subsection (a)(2) was incorporated in F.R.A.P. 4 as a part of the 1979 amendments to the rules. In ascertaining the meaning of the rules, the construction given to the rules by the Advisory Committee is of weight. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2408 (1988); *Mississippi Pub. Corporation v. Murphree*, 326 U.S. 438, 444 (1946). The Advisory Committee Notes say:

> The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See e.g., *Matter of Grand Jury Empanelled [sic] Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976) [sic]; *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 469 [sic] (9th Cir. 1965).[6]

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[6] IMI says that F.R.A.P. 4(a)(2) "filled the gap created by *Bankers Trust.*" (IMI's Brief p. 18.) The Advisory Committee Note to Subdivision (a)(2) makes it clear

In each of the cases cited by the Advisory Committee, a notice of appeal was filed after announcement of a decision or order, but prior to the formal entry of a written final judgment or order.[7] The appellate courts upheld jurisdiction because the decision in question, even though technically subject to modification,[8] was subsequently memorialized in an appealable, written judgment.[9]

In our case, the trial court announced, at the conclusion of the hearing on IMI's Motion for

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that the Advisory Committee was not looking to the *Bankers Trust* case. Instead, the amendment was intended to codify existing law that a notice of appeal which is directed to a non-appealable order will be regarded as directed to a subsequently entered final decision. The Advisory Committee made it clear that it intended the same result whether the nonappealable order was oral *(Matter of Grand Jury, supra; Hodge v. Hodge, supra)* ***or non-final*** *(Ruby, supra; Firchau, supra).*

[7] Two of the cases cited by the Advisory Committee were virtually identical to our case. *Matter of Grand Jury, supra; Hodge v. Hodge, supra.* In both *Matter of Grand Jury* and *Hodge v. Hodge,* the trial court orally announced its decision, the notice of appeal was filed and thereafter the trial court memorialized its orally announced decision in a written judgment. In both *Matter of Grand Jury* and *Hodge v. Hodge,* the court said that, so long as the trial court's written order is an appealable one and the non-appealing party is not prejudiced by the premature notice of appeal, the court of appeals should decide the case on the merits rather than dismiss the case based on a technicality. It is undisputed that, in our case, the trial court's March 3, 1989 written order was a final, appealable order. It is also undisputed that IMI was not prejudiced by FirsTier's premature notice of appeal.

[8] F.R.C.P. 59(d) provides that the court may, on its own initiative, order a new trial for any reason within 10 days after entry of judgment. Of course, any order, whether oral or written, is technically subject to modification during the time for filing post-decision motions.

[9] F.R.A.P. 4(a)(2) recognizes the distinction between (1) the announcement of a "decision or order" and (2) the entry of "the judgment or order." The term, "decision," is not defined in either the civil or appellate rules. Read in the context of the cases cited by the Advisory Committee, the term "announcement of a decision" encompasses oral announcements of orders from the bench.

Summary Judgment, that all of the policies which were the subject of FirsTier's lawsuit "are cancelled as void." (J.A. p. 27.) The trial court decided all of the issues as to all of the parties in the case. If this is not the kind of "announcement of a decision or order" within the contemplation of F.R.A.P. 4(a)(2), we do not know what would be.[10] One can tell by reading the transcript that the case was over as a practical matter. *Gillespie v. U.S. Steel Corporation,* 379 U.S. 148 (1964). For example, if, for some reason, the assigned judge had been unable to complete the case, any successor judge could have determined what the written judgment should say. F.R.C.P. 63. There would have been no need for a new hearing to re-argue the issues in the case.

C. Notice of Appeal From Non-final Order Does Not Transfer Jurisdiction to Appellate Court. IMI argues that because the trial court was considering suggested findings of fact and conclusions of law, the policy reasons behind Rule 4(a)(4) are implicated because both the court of appeals and the trial court would be considering the same question during the gap period between announcement of the trial court's order and memorialization of the decision in a judgment. IMI's reasoning ignores the "start-time" of F.R.A.P. 4(a)(2). F.R.A.P. 4(a)(2) specifies that the premature notice of appeal is not treated as filed until after the trial court

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[10] IMI's reliance on *United States v. Hansen,* 795 F.2d 35 (7th Cir. 1986) is misplaced. The case is not even similar to this case on its facts. Clearly, in *Hansen,* when the defendants filed their notice of appeal, there was no final order which disposed of all of the issues as to all of the parties in the case. The principles announced in *Hansen* simply do not apply to this case. *Hansen* also improperly construes F.R.A.P. 4(a)(2). (See Proposition III, *infra.*)

enters judgment. Only then does the appellate court begin considering the matter. The court of appeals and the district court would therefore not be "simultaneously analyzing the same judgment." (IMI's Brief p. 21.) See, e.g., *Ruby v. Secretary of the Navy, supra; Firchau v. Diamond Nat'l Corp., supra.*

PROPOSITION III

COURT OF APPEALS READS REQUIREMENT OF "FINALITY" INTO F.R.A.P. 4(a)(2)

A. F.R.A.P. 4(a)(2) Does Not Require Final Decision. The court of appeals dismissed FirsTier's appeal because it found that the trial court's announcement "was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.) The court did not tell us why it thought the decision was not final. The parties in our case believed the trial court's decision was final when it was announced. However, even if the oral order was not a final decision, F.R.A.P. 4(a)(2) should have saved FirsTier's appeal. The court of appeals' decision would read an additional unsupported limitation into F.R.A.P. 4(a)(2): that the announcement of the decision or order must be the announcement of a complete ***final judgment*** not subject to further review or revision. Such a requirement is inconsistent with the Advisory Committee Notes and with the plain language of F.R.A.P. 4(a)(2).

Such a requirement would also turn appellate practice on its head. Pursuant to F.R.C.P. 59(d), not later than ten (10) days after ***entry*** of a judgment, the trial court may, on its own initiative, order a new trial. The parties may file

post-decision motions to revise the judgment during that same period of time. Utilizing IMI's reasoning, the time limit for filing a notice of appeal would not begin to run until the eleventh day after judgment is entered.

The approach taken by the Tenth Circuit Court of Appeals does not follow the basic principles embodied in the federal appellate rules. The adoption of the F.R.A.P. 4(a)(6) requirement for a specific final written order by the district court was designed to avoid problems in determining the appropriate time to file an appeal. When adopted, F.R.A.P. 4(a)(6) could have established a bright line rule with no exceptions. However, this was not the intent of the 1979 rule revision. See, *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). F.R.A.P. 4(a)(6) was adopted to ***reduce confusion*** in determining when a party's right to appeal began. However, to accommodate already recognized exceptions for premature appeals, the Advisory Committee also adopted F.R.A.P. 4(a)(2) to ***save*** such appeals. The approach adopted by the Tenth Circuit Court of Appeals does not provide F.R.A.P. 4(a)(2) the necessary scope needed to give effect to the very reason for its creation – the validation of an appeal noticed after announcement of a non-final decision which is subsequently entered as ***a part of the district court's final judgment.***

B. Majority Approach Does Not Require Announcement of Final Judgment. Following the spirit of the Advisory Committee's expressed view, the large majority of circuits have held that any appeal noticed after a decision is announced, even though such decision was techni-

cally not final, is effective under F.R.A.P. 4(a)(2) when (i) that decision is subsequently validated by incorporation in a final judgment entered under F.R.C.P. 54(b) or 58 and (ii) no post-judgment motions under F.R.C.P. 50, 52, or 59 are filed. *Leonhard v. United States,* 633 F.2d 599 (2d Cir. 1980), *cert. den.,* 451 U.S. 908 (1981); *Dowling v. Philadelphia,* 855 F.2d 136 (3d Cir. 1988); *Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc.,* 876 F.2d 353 (4th Cir. 1989); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160, 1165-1166 (5th Cir. 1984); *Aguirre v. S.S. Sohio Intrepid,* 801 F.2d 1185 (9th Cir. 1986); *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641 (10th Cir. 1988); *Tidler v. Eli Lilly and Co., Inc.,* 824 F.2d 84 (D.C. Cir. 1987). The majority view treats appeals noticed after (1) the announcement of a non-final decision of liability (*Federal Sav. & Loan Ins. Corp., supra*), (2) a non-final decision on fewer than all the claims in the litigation (*Aguirre, supra; Dowling, supra*) or (3) a non-final adjudication of the rights of fewer than all parties (*Leonhard, supra*) as effective upon the entry of a final judgment.

FirsTier satisfied the requirement, announced by the Second, Third, Fourth and Ninth circuits, that a premature appeal should be effective in the absence of prejudice to the opposing party. *Leonhard v. United States, supra; Dowling v. Philadelphia, supra; Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc., supra; Aguirre v. S.S. Sohio Intrepid, supra.* In this case, IMI has failed to show or even claim that any prejudice would result from giving effect to the premature appeal.

The Tenth Circuit Court of Appeals ignored the well-recognized principle announced by this Court that restrictive construction of appellate notice requirements is totally improper. *Foman v. Davis,* 371 U.S. 178 (1962).[11] F.R.A.P. 4 should not be construed to eliminate the right to appeal, but rather to save it. *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). FirsTier satisfied all requirements stated in the plain language of F.R.A.P. 4(a)(2). FirsTier's Notice of Appeal from the trial court's announced decision is the precise type of notice which F.R.A.P. 4(a)(2) was intended to save. *Matter of Grand Jury, supra; Hodge v. Hodge, supra.*

C. Circuit Court Decision Follows Minority Approach. Without so stating, the Tenth Circuit Court of Appeals has adopted the minority position set forth in *United States v. Hansen,* 795 F.2d 35 (7th Cir. 1986) and *General Television Arts, Inc. v. Southern Ry. Co.,* 725 F.2d 1327 (11th Cir. 1984).[12] The minority position takes the restric-

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[11] Citing *Torres v. Oakland Scavenger Co.,* 108 S.Ct. 2405 (1988), IMI says that this Court's decision in *Foman v. Davis* "did not involve a jurisdictional issue." (IMI's Brief p. 14.) In *Torres,* this Court said, at p. 2408, that "*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature." In the next sentence of the opinion, this Court reaffirmed "the important principle for which *Foman* stands – that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." This Court affirmed dismissal of the appeal in *Torres* because the notice of appeal did not give notice of the individual or entity seeking to appeal. *Id.* p. 2409. *Torres* does not apply to this case. IMI knew that FirsTier sought to appeal from the trial court's grant of IMI's Motion for Summary Judgment. The principles announced in *Foman* support FirsTier.

[12] The Tenth Circuit Court of Appeals' decision in our case is also inconsistent with its own forgiving attitude toward premature appeals. *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641, 645 (10th Cir. 1988).

tive view that F.R.A.P. 4(a)(2) applies only to the announcement of a completely *final judgment* which is subsequently entered *without change or addition.*[13]

The minority rationale set forth in *Hansen* and *General Television* is an improper construction of F.R.A.P. 4(a)(2). This improper construction, in essence, renders that provision useless. These decisions are contrary to the historical basis upon which F.R.A.P. 4(a)(2) was incorporated in the appellate rules. In both *Hansen* and *General Television,* a non-final decision was announced which subsequently became final through entry of a final judgment under F.R.C.P. 58. The notice of appeal in each case was filed after the announcement of a decision upon which an appeal was sought. Under F.R.A.P. 4(a)(2), such notice should have been effective to appeal the decision in question. However, because of its strained interpretation of F.R.A.P. 4(a)(2), the minority holds such appeals to be without effect.

Citing the *Hansen* case, IMI asks this Court to adopt a strained interpretation of F.R.A.P. 4(a)(2). The *Hansen* case, in effect, rewrote the phrase "announcement of a decision" to read "announcement of a final judgment." In reaching its result, the *Hansen* court had to distinguish its own prior decisions construing F.R.C.P. 54(b). See, e.g., *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 760 F.2d 177

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[13] The Seventh Circuit in *Hansen* states its view to be the "majority" position. FirsTier has counted the circuits and disagrees that *Hansen* follows the majority approach, but sometimes it is difficult to place a decision in one camp or the other.

(7th Cir. 1985). IMI quoted the *Hansen* distinction on p. 25 of its brief: "The notice of appeal in such a case is timely; all that is missing is a finding necessary to make the order appealed from appealable." *Hansen,* p. 38. But if the order is "appealable" then there is no need for Rule 4(a)(2). The *Hansen* distinction is also inconsistent with F.R.C.P. 54(b) and with IMI's own reasoning on the issue of finality. Pursuant to F.R.C.P. 54(b), an order which disposes of fewer than all claims as to fewer than all parties is always subject to revision until the court has either issued a Rule 54(b) certification or entered a final judgment. The strained interpretation of F.R.A.P. 4(a)(2), which rewrites "announcement of a decision" to read "announcement of a final judgment" emasculates the rule, even in a Rule 54(b) context. If the decision announced must be final in the sense that it is no longer subject to revision, as IMI suggests, then we could never have an announcement of a decision or order until the trial court has either issued a Rule 54(b) certification or entered judgment. IMI's reasoning and the reasoning of the *Hansen* court ignores the distinction contained in F.R.A.P. 4(a)(2) between "announcement of a decision or order" and "entry of the judgment or order."[14]

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[14] IMI's reasoning would also render F.R.A.P. 4(a)(4) useless. F.R.A.P. 4(a)(4) describes the kinds of post-decisional motions that, if filed, will nullify a previously filed notice of appeal. Utilizing IMI's reasoning, however, *any* notice of appeal filed during the time when *any* post-decision motion *may* be filed would be a nullity, because any decision is always subject to revision during that time. IMI's reasoning would render the description of F.R.A.P. 4(a)(4) tolling motions useless and ineffective.

CONCLUSION

The trial court's decision as announced from the bench was final in the sense that the trial court's order completely disposed of all of the issues as to all of the parties. One could read the transcript of the proceedings and determine that the case was over when the trial court granted IMI's Motion for Summary Judgment. The policies were cancelled as of the date of the court's order. Even if the decision were not "final," F.R.A.P. 4(a)(2) saves FirsTier's appeal. Nothing in F.R.A.P. 4(a)(2) requires that a notice of appeal must be filed after announcement of a ***final*** decision or order. The decision of the Tenth Circuit Court of Appeals should be reversed.

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